No. 85-588

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

THE UNIVERSITY OF TENNESSEE, *et al.*,
Petitioners,

v.

ROBERT B. ELLIOTT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE UNIVERSITY OF TENNESSEE

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL *
KATHRYN SCULLY
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae Equal Employment Advisory Council

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-588

THE UNIVERSITY OF TENNESSEE, *et al.*,
Petitioners,

v.

ROBERT B. ELLIOTT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE UNIVERSITY OF TENNESSEE

The Equal Employment Advisory Council respectfully submits this brief amicus curiae on behalf of the University of Tennessee, seeking reversal of the decision below. The parties' written consents to file this brief have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council (EEAC or Council) is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies,

procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Substantially all of EEAC's members, or their constituents, are employers subject to various federal and state equal employment laws, including Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* Thus, EEAC has a direct interest in the issue presented for the Court's consideration in the instant case, *i.e.*, whether a final decision by a state administrative agency acting in a judicial capacity, finding no merit to claims of discrimination, bars a subsequent federal court action under Title VII and 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 1988, which raises the same issues of employment discrimination.

Because of its interest in the res judicata effect of prior state court and administrative decisions, EEAC filed an amicus brief in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982). In addition, EEAC has filed briefs as amicus curiae on numerous other occasions in this Court. *See, e.g., Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), and *I.U.E. Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976).

STATEMENT OF THE CASE

On December 18, 1981, plaintiff Robert Elliott, a minority employee of the University of Tennessee Agricultural Extension Service, was advised by the University that he was to be terminated from his job because of inadequate job performance and behavior and incidents of gross misconduct. On December 22, 1981, Elliott filed an administrative appeal under the Tennessee Uniform Administrative Procedures Act. On January 5, 1982, he filed a federal complaint under Title VII and 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988.

Pursuant to the state administrative appeal procedure, set forth in the Contested Case Provisions of the Tennessee Uniform Administrative Procedures Act (UAPA), Tenn. Code Ann. § 4-5-301, an administrative judge conducted a lengthy due process hearing into Elliott's charges, during which the parties were accorded complete trial rights. Elliott's counsel examined nearly 100 witnesses at the hearing and insisted that evidence of alleged racial discrimination be admitted. The administrative judge found that the University's action was based on inadequate job performance and behavior rather than racial discrimination.

Elliott appealed these findings to the University of Tennessee Vice President for Agriculture, who con-

cluded that the actions of the University were not racially motivated and rejected the appeal. Elliott failed to file a petition for review of the administrative judge's decision in the state courts within sixty days of the order, a right provided in the state statute. Instead, eighty-four days after the final administrative order, Elliott renewed his federal complaint and requested a temporary restraining order, claiming that the final administrative order was arbitrary, retaliatory, wrongful, illegal, harassing, unnecessary and damaging to his reputation. The University opposed this motion and filed a motion for summary judgment.

The district court granted the University's motion for summary judgment, holding that it was precluded by principles of res judicata from reviewing the issues fully litigated in the administrative hearing. The court noted that exclusive jurisdiction to judicially review the merits of a final order entered in a UAPA contested case is vested in the Tennessee chancery courts under Tenn. Code Ann. § 4-5-322. *United Inter-Mountain Telephone Co. v. Public Service Commission*, 555 S.W.2d 389 (Tenn. 1977). Elliott, however, did not seek judicial review of the final administrative decision in the Tennessee chancery courts, but instead renewed his action in federal court. The district court found that Elliott could not utilize the federal civil rights statutes to relitigate what he had litigated over a five-month period during the administrative hearing.

The United States Court of Appeals for the Sixth Circuit reversed, holding that unreviewed state administrative judgments are not entitled to preclusive effect in subsequent federal court actions under Title VII or sections 1981, 1983, 1985, 1986 and 1988.

SUMMARY OF ARGUMENT

The doctrine of res judicata mandates that a final, valid judgment, conclusive as to all matters of fact and law, acts as an absolute bar to a subsequent action between the same parties upon the same claim or demand. The related doctrine of collateral estoppel precludes relitigation of identical issues which are raised in subsequent suits involving the same parties or their privies. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 (1979). These preclusion doctrines apply to administrative, as well as to judicial proceedings. As this Court stated in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 484 n.26 (1982):

> Certainly, the administrative nature of the fact-finding process is not dispositive. In *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 . . . (1966), we held that, so long as opposing parties had an adequate opportunity to litigate disputed issues of fact, res judicata is properly applied to decisions of an administrative agency acting in a "judicial capacity." *Id.* at 422. . . .

Based on the principles enunciated by this Court in *Kremer*, the final administrative decision at issue in this case is entitled to preclusive effect. In *Kremer*, the Court held that full faith and credit principles, as codified in 28 U.S.C. § 1738, bar a Title VII lawsuit in federal court when the claim previously has been adjudicated by a state administrative agency and affirmed on appeal by a state court. The Court reasoned that the *opportunity* for judicial review, to ensure that the administrative decision was not arbitrary and capricious and that the claimant was not denied any procedural rights to which he was en-

titled, provided the necessary due process, thus justifying the application of full faith and credit.

In the instant case, the administrative and judicial procedures available to the plaintiff met the *Kremer* due process requirements. *See Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, 768 F.2d 842, 852 (7th Cir. 1985), *petition for cert. filed*, —— U.S.L.W. —— (U.S. ————) (No. 85-6094). The parties had ample opportunity to gather and present evidence and were accorded full trial rights. Most importantly, Elliott had an opportunity to appeal the findings of the administrative judge in state court, although he declined to avail himself of this opportunity.

In addition, these administrative proceedings met the requirements set forth in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966), *i.e.*, the parties had an adequate opportunity to litigate disputed issues of fact before the administrative judge, who was acting in a judicial capacity. Therefore, the decision of the administrative judge, finding that Elliott did not meet his burden of proving discrimination, is entitled to preclusive effect. Accordingly, Elliott should be barred from litigating the same issues of race discrimination in a subsequent suit in federal court.

Finally, the decision of the administrative judge should be given preclusive effect to promote judicial finality and prevent needless litigation. Absent such a finding, parties would be unable to rely on prior adjudications, and litigation of the same claims and issues would continue ad infinitum.

ARGUMENT

I. TRADITIONAL PRINCIPLES OF RES JUDICATA AND COLLATERAL ESTOPPEL APPLY TO ADMINISTRATIVE PROCEEDINGS.

In this case, an administrative judge acting in a judicial capacity presided over a lengthy hearing in which over 100 witnesses testified and over 150 exhibits were entered into evidence. At this hearing, Elliott had ample opportunity to defend against charges brought by the University of Tennessee. As a defense against these charges, he introduced evidence of alleged race discrimination. All of this evidence was considered by the administrative judge in reaching his decision that the actions of the University were not based on race discrimination. Moreover, this decision was reviewed thoroughly by the Vice President for Agriculture at the University, who adopted the initial order of the administrative judge and determined, not only that the proposed termination of Elliott by the University was not based on race but also that Elliott had been afforded ample opportunity to defend himself against the charges brought by the University. Elliott now seeks to relitigate the same issues of employment discrimination in federal court. Clearly, res judicata principles should apply in this case to preclude such relitigation.

The judicial doctrine of res judicata mandates that a final, valid judgment on the merits of an action precludes the parties or their privies from relitigating the same claims or demands that were or could have been raised in the first action. *Allen v. McCurry*, 449

U.S. 90, 94 (1980).[1] 1B Moore's Federal Practice ¶ 0.405[1]. The related doctrine of collateral estoppel, "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation."[2] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (case citation omitted). *See also Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948) (Collateral estoppel "is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally."). "[C]ollateral estoppel treats as final only those questions actually and necessarily decided in a prior suit."

---

[1] The doctrine of res judicata has evolved primarily because of a recognition by the courts that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Traveling Men's Association*, 283 U.S. 522, 525 (1931).

[2] In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979) (citations omitted), the Court distinguished between the doctrines of res judicata and collateral estoppel, stating as follows:

> Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.

In this brief, when we refer to "principles of res judicata," we are referring generally to the doctrine of judicial preclusion, including collateral estoppel.

Brown v. Felsen, 442 U.S. 127, 139 n.10 (1979) (case citations omitted). Unlike the doctrine of res judicata, application of collateral estoppel does not require identical causes of action. 1B Moore's Federal Practice ¶ 0.441[2].

These preclusion doctrines are applicable to administrative determinations. In *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 423 (1966), this Court found that the Court of Claims had failed to give finality to factual findings made by the Board of Contract Appeals, when the Board was acting in a judicial capacity. Reversing this portion of the Court of Claims decision, the Court noted that:

> [T]he result we reach is harmonious with general principles of collateral estoppel. Occasionally courts have used language to the effect that *res judicata* principles do not apply to administrative proceedings, but such language is certainly too broad. *When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.*

Id. at 421-22 (footnotes & case citations omitted & emphasis added).[3] *See, e.g., Hayfield Northern Rail-*

---

[3] In refusing to apply res judicata principles to the administrative findings in this case, the Sixth Circuit stated that *Utah Construction* applies only to *federal* administrative decisions. *Elliott v. University of Tennessee*, 766 F.2d 982, 989 (6th Cir. 1985). According to the Sixth Circuit, "[t]he Court [in *Utah Construction*] did not address the deference that federal courts should give to the unreviewed findings of state administrative agencies in subsequent federal civil rights ac-

road Co. v. Chicago & North Western Transportation Co., —— U.S. ——, 104 S. Ct. 2610, 2619 n.15 (1984); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 484 n.26 (1982); *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 281 (1980) ("[T]he factfindings of state administrative tribunals are entitled to the same res judicata effect in the second State as findings by a court.").

Accordingly, this Court must determine whether the specific administrative decision at issue in this case is entitled to preclusive effect. Based on this Court's decision in *Kremer*, we argue below that the administrative determination should be given preclusive effect, and thus should bar Elliott from relitigating the same issue of employment discrimination in federal court.

---

tions." *Id.* (footnote omitted). This interpretation of *Utah Construction* is unduly narrow. As indicated above, the Court did not refer to state or federal administrative agencies, but simply to "an administrative agency." *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966). Moreover, many courts have applied *Utah Construction* to state administrative decisions. *See, e.g., Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, 768 F.2d 842, 849-53 (7th Cir. 1985), *petition for cert. filed*, —— U.S.L.W. —— (U.S. ——) (No. 85-6094); *Zanghi v. Incorporated Village of Old Brookville*, 752 F.2d 42, 46 (2d Cir. 1985) (applying *Utah Construction*, Second Circuit held that state administrative hearing and appeal must be given preclusive effect in subsequent 42 U.S.C. § 1983 action).

II. THE DISTRICT COURT PROPERLY DISMISSED THE FEDERAL CAUSE OF ACTION, HOLDING THAT IT WAS PRECLUDED BY PRINCIPLES OF RES JUDICATA FROM REVIEWING ISSUES FULLY LITIGATED IN THE STATE ADMINISTRATIVE HEARING.

A. This Court's Decision In *Kremer v. Chemical Construction Corp.* Supports The Application of Res Judicata Principles To The Final Decision Of The Administrative Judge.

1. *Title VII Does Not Supersede The Judicial Doctrine of Res Judicata, As Codified In 28 U.S.C. § 1738.*

In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 463 (1982), this Court was faced with the question of "whether Congress intended Title VII to supersede the principles of comity and repose embodied in § 1738." In holding that Title VII does not supersede section 1738,[4] the Court reasoned that granting full faith and credit to a state court proceeding in no way hinders the enforcement of Title VII. The Court stressed that:

> Nothing in the legislative history of the 1964 Act suggests that Congress considered it necessary or desirable to provide an absolute right to relitigate in federal court an issue resolved by a state court. While striving to craft an optimal niche for the States in the overall enforcement

---

[4] 28 U.S.C. § 1738 provides, in pertinent part, that:

> The . . . judicial proceedings of any court of any such State * * * shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

scheme, the legislators did not envision full litigation of a single claim in both state and federal forums.

Id. at 473-74.

Furthermore, the Court found that:

> In our system of jurisprudence the usual rule is that merits of a legal claim once decided in a court of competent jurisdiction are not subject to redetermination in another forum . . . . Because there is no "affirmative showing" of a "clear and manifest" legislative purpose in Title VII to deny res judicata or collateral estoppel effect to a state court judgment affirming that a claim of employment discrimination is unproved, and because the procedures provided in New York for the determination of such claims offer a full and fair opportunity to litigate the merits, [the plaintiff will be prohibited from relitigating his claim in federal court]."

Id. at 485.

Although the Court in *Kremer* had before it the specific question of whether a decision of an administrative agency which was affirmed by a state court would preclude a subsequent suit in federal court, the Court in no way found it dispositive that the agency decision was *actually reviewed* by a state court. Instead, the Court based its decision on the fact that *judicial review was available* to the plaintiff. *Id.* at 484. *See O'Hara v. Board of Education of Vocational School*, 590 F. Supp. 696, 701 (D.N.J. 1984), *aff'd mem.*, 760 F.2d 259 (3d Cir. 1985) ("The important due process criterion is the *opportunity* to present one's evidence, and it is irrelevant that the party declined to take advantage of that opportu-

nity." (emphasis in original & case citations omitted)).

The Court stressed that in determining whether to apply full faith and credit in any given situation, all of the procedures provided by state law must be taken into consideration. The Court specifically pointed out that "this panoply of procedures, complemented by administrative as well as judicial review, is sufficient under the Due Process Clause" and that "[c]ertainly, the administrative nature of the factfinding process is not dispositive." *Kremer*, 456 U.S. at 484 & n.26 (footnote & case citation omitted).

We maintain that section 1738 should apply in this case to preclude relitigation of the factfindings of the state administrative agency acting in its judicial capacity. However, even if section 1738 did not apply, as the Seventh Circuit noted in *Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, 768 F.2d 842, 849 (7th Cir. 1985), *petition for cert. filed*, —— U.S.L.W. —— (U.S. ——) (No. 85-6094):

> [T]he inapplicability of section 1738 does not end our *res judicata* analysis. In footnote 26 of the *Kremer* opinion the Supreme Court acknowledged the doctrine of "administrative *res judicata*," stating that "so long as opposing parties had an adequate opportunity to litigate disputed issues of fact, res judicata is properly applied to decisions of an administrative agency acting in a 'judicial capacity.'" 456 U.S. at 485 [sic] n.26. . . .

(citation omitted).

The *Kremer* opinion clearly mandates that the total state procedure provided to a plaintiff be considered in determining whether a state court or ad-

ministrative decision should be granted preclusive effect. 456 U.S. at 483-85. Therefore, in the instant case, the paramount question is whether Elliott was denied any of the procedural rights to which he was entitled, including the right of judicial review to assure that the administrative decision was not arbitrary and capricious. As discussed below in Part B, Elliott was not denied any of the procedural rights to which he was entitled. Although he was entitled to judicial review, he opted not to pursue it. His failure to avail himself of such review, however, does not render the state's procedures inadequate and therefore incapable of supporting an application of res judicata. *Id.* at 485.

2. Kremer *Does Not Preclude Application Of Res Judicata Principles To An Unreviewed Decision Of An Administrative Agency Acting In A Judicial Capacity.*

In holding that the decision of the administrative judge was not entitled to preclusive effect, the Sixth Circuit indicated that the decision in *Kremer* stands for the proposition that unreviewed state administrative determinations are not entitled to deference under res judicata principles. *Elliott v. University of Tennessee*, 766 F.2d 982, 988 (6th Cir. 1985). The Sixth Circuit stated as follows:

> [T]he *Kremer* Court itself made plain in footnote 7 that its rule of non-preclusion with respect to unreviewed state administrative decisions applies to the decisions of those agencies that have full enforcement authority and provide full adjudicative procedures as well as to the decisions of agencies that lack those attributes.

Id. This interpretation does not comport with the holding in *Kremer*, nor with established principles of res judicata.

Footnote seven reads as follows:

> EEOC review of discrimination charges previously rejected by state agencies would be pointless if the federal courts were bound by such agency decisions . . . . *Nor is it plausible to suggest that Congress intended federal courts to be bound further by state administrative decisions than by decisions of the EEOC.* Since it is settled that decisions by the EEOC do not preclude a trial *de novo* in federal court, it is clear that unreviewed administrative determinations by state agencies also should not preclude such review even if such a decision were to be afforded preclusive effect in a State's own courts.

456 U.S. at 470 (citations omitted & emphasis added). It is clear, when this footnote is read in context with the remainder of the *Kremer* decision, that the Supreme Court did not hold that state administrative determinations may not be given preclusive effect. Rather, as the Seventh Circuit explained in *Buckhalter*, 768 F.2d at 854:

> In footnote 7, the Supreme Court was clearly referring to the state administrative agency in its investigatory capacity as it analogized the state agency to the EEOC, a Federal agency that is authorized to act only in an investigatory capacity. The import of footnote 7 is that neither an investigatory determination of the EEOC nor an investigatory determination of a state administrative agency precludes a trial *de novo* in Federal court. The Supreme Court made clear, however, in footnote 26 of the *Kremer* opinion, that when the state administrative agency acts in a judicial capacity, its ruling on the claim of employment discrimination is entitled to preclusive

effect in the Federal court under the doctrine of "administrative *res judicata*."

The Seventh Circuit's interpretation is clearly correct. In commenting on the preclusive effect to be given to administrative decisions, footnote seven in *Kremer* was addressing the situation of state agencies exercising limited functions like those given the EEOC, and not state agencies acting in judicial capacities. The EEOC is empowered only to investigate complaints and decide whether to press charges based upon its investigations. Title VII does not give the EEOC any powers to adjudicate claims and render decisions regarding the guilt or innocence of Title VII defendants. State agencies, on the other hand, often have both investigatory and court-like enforcement authority and consequently can both press charges and adjudicate cases, thus establishing the existence or non-existence of a violation of the state's anti-discrimination laws. Such state agencies, therefore, are capable of making two very distinct types of decisions which should not be casually lumped together to support the argument that federal courts must grant de novo trials to plaintiffs whose claims have been adjudicated and dismissed at the state administrative level.

It is clear that decisions of the EEOC do not preclude *de novo* trials in federal courts, and it is likewise true that administrative decisions of state agencies which are similar to those of the EEOC, *i.e.*, decisions pertaining to whether to press charges, also should not be given preclusive effect in federal court. Decisions by state agencies acting in their judicial capacity, however, do not fall within the scope of this footnote. Because the administrative judge in this case was clearly acting in a judicial capacity, *see* dis-

cussion in Part B, and had full enforcement authority and adjudicative powers, his decision is entitled to res judicata effect.

B. Because The Administrative Judge Was Acting In A Judicial Capacity When He Conducted The Due Process Hearing Which Resolved Disputed Issues Of Fact Properly Before Him And The Parties Had An Adequate Opportunity To Litigate Those Issues, Principles Of Res Judicata Bar A Subsequent Suit In Federal Court.

1. The Decision Of The Administrative Judge Should Be Given Collateral Estoppel Effect.

In order for a federal court to give collateral estoppel effect to a state administrative determination, the following requirements must be satisfied:

(1) The administrative judge must have acted in a judicial capacity;

(2) The administrative judge must have resolved disputed issues of fact properly before him;

(3) The parties must have had a full and fair opportunity to litigate; and

(4) The state courts would hold that the state administrative decision should be given preclusive effect.

O'Hara v. Board of Education of the Vocational School, 590 F. Supp. at 701. As shown below, each of these requirements has been met in this case. Accordingly, this Court should find that the decision of the state administrative agency that the actions taken by the University against Elliott were not based on race discrimination, is entitled to collateral estoppel effect.

We note that, in this case, the application of collateral estoppel will operate as a complete bar to the federal action because the administrative judge's finding that the University's actions were not based on race discrimination is determinative of the controversy in the second suit. *Id.* (court held that finding of administrative law judge, affirmed by Commissioner of Education, that plaintiff's discharge was warranted, was entitled to collateral estoppel effect, and thus barred Title VII action); *see* 1B Moore's Federal Practice ¶ 0.441[2].

2. *The Administrative Judge Was Acting In A Judicial Capacity When He Conducted The Administrative Hearing And Issued The Final Decision In This Case.*

"[I]t [is] clear that issues of fact determined by an administrative agency *acting in a judicial capacity* may collaterally estop future relitigation of administratively determined issues." *Lee v. City of Peoria*, 685 F.2d 196, 198 (7th Cir. 1982) (emphasis added) (citing *Utah Construction*, 384 U.S. at 422). Courts have found administrative agencies to be acting in a judicial capacity where the proceeding was adversarial and the parties were represented by counsel, presented evidence and arguments, submitted briefs, and had an opportunity to seek judicial review. *See, e.g., Buckhalter*, 768 F.2d at 851-52 (Human Rights Commission found to be acting in judicial capacity where proceeding conducted just as a trial in Illinois state court); *EZ Loader Boat Trailers, Inc. v. Cox Trailers, Inc.*, 746 F.2d 375, 378 (7th Cir. 1984); *Groom v. Kawasaki Motors Corp., USA*, 344 F. Supp. 1000, 1002 (W.D. Okla. 1972).

To determine whether the administrative judge was acting in a judicial capacity in this case, it is necessary to examine the Tennessee Uniform Administrative Procedures Act (UAPA) and the actual administrative proceeding. Section 4-5-301 of the UAPA sets forth the procedures to be followed in hearing a contested case. Pursuant to these administrative procedures, parties are afforded complete trial rights, including the right to be represented by counsel, to receive notice of the hearing, to file pleadings, motions, briefs, and proposed findings of fact and conclusions of law, to request the administrative judge to issue subpoenas, and to examine and cross-examine witnesses. Tenn. Code Ann. §§ 4-5-305 to -312. The parties in this case were afforded these rights.

In addition, the administrative judge presided at the hearing, ruled on questions of the admissibility of evidence and swore witnesses. *Id.* at § 4-5-301(b). The parties had ample opportunity, not only to litigate the disputed issues of fact, but also to seek state court review of the final administrative decision. *Id.* at § 4-5-322. Elliott presented more than ninety witnesses and cross-examined some of the agency's witnesses for more than thirty hours each. Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit (Appendix to Petition at A31. The initial order of the administrative judge was a ninety-six page document and contained extensive findings of fact and conclusions of law, as required under Tenn. Code Ann. § 4-5-314(c). *Id.* It is clear that the administrative judge was acting in a judicial capacity when he conducted the hearing and issued the decision in this case.

3. *Factfindings Of The Administrative Judge Are Entitled To Preclusive Effect.*

"[T]he factfindings of state administrative tribunals are entitled to the same res judicata effect in the second State as findings by a court." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 281 (1980) (citing *Chicago, R. I. & P. Ry. Co. v. Schendel*, 270 U.S. 611 (1926) (Iowa state compensation award based on factual finding that employee engaged in *intrastate* commerce precluded subsequent claim under Federal Employer's Liability Act brought in Minnesota state courts which would have required finding that employee engaged in *interstate* commerce)). Factfindings by state administrative tribunals are entitled to the same res judicata effect in federal court. *O'Connor v. Mazzullo*, 536 F. Supp. 641, 643-44 (S.D.N.Y. 1982) (factual determinations of motive by state agency entitled to collateral estoppel effect in later suit in federal court).

Accordingly, the factual findings of the administrative judge in this case, *i.e.*, that the actions taken by the University were not based on racial discrimination,[5] are entitled to preclusive effect in the federal court action.

---

[5] The administrative judge made the following factual determination:

> An overall and thorough review of the entire evidence of record leads me to believe that employer's action in bringing charges against employee, resulting in these proceedings were based on what it, through its administrative officers and supervisors perceived as improper and/or inadequate behavior and inadequate job performance rather than racial discrimination. I therefore conclude that employee has failed in his burden of proof to the claim of racial discrimination as a defense to the charges against him.

Appendix to Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit at A177.

4. *The Record Clearly Shows That The Respondent Had A Full And Fair Opportunity To Litigate The Issue Of Race Discrimination Before The Administrative Judge.*

In order for a final administrative decision to be given preclusive effect, the parties must have had a full and fair opportunity to litigate. *See Kremer*, 456 U.S. at 481-82 & cases cited therein. "[N]o single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause." *Id.* at 483 (case citations omitted). Administrative proceedings which provide for an opportunity informally to present charges against an employer on the record, including submitting exhibits, testimony, and rebuttal evidence, with access to attorney assistance and compulsory process, meet the requirements of due process when judicial review is available to determine that no procedural rights were denied and that the agency decision was not arbitrary and capricious. *Id.* at 483-84; *Buckhalter*, 768 F.2d at 852.

The proceedings under the Tennessee Uniform Administrative Procedures Act satisfy due process requirements. As discussed above, the UAPA provides parties with notice, opportunity to be heard, representation at a party's own expense by counsel, full opportunity to file pleadings, motions, objections and offers of settlement, as well as briefs, proposed findings of fact and conclusions of law, and proposed initial or final orders. At the request of any party,

the administrative judge also shall issue subpoenas and effect discovery. Further, at the hearing, the parties are afforded the opportunity to respond, present evidence and argument, cross-examine witnesses and submit rebuttal evidence. At the conclusion of the hearing, the administrative judge must render an initial order, which becomes final unless reviewed by the agency. Finally, a person aggrieved by the final order is entitled to judicial review in chancery court. Tenn. Code Ann. §§ 4-5-301 to -322.

In this case, "a UAPA hearing was convened in Jackson, Tennessee, on April 26, 1982. It continued with various recesses until its conclusion five months later on September 29, 1982. The administrative record consists of 55 volumes of transcript containing over 5,000 pages of the testimony of over 100 witnesses and 153 exhibits." Appendix to Petition at A27. Initial review of the administrative judge's order was conducted by the agency. Although Elliott failed to avail himself of state court review, "[t]he fact that [he] failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy." *Kremer*, 456 U.S. at 485.

Because Elliott had a full and fair opportunity to litigate the issue of race discrimination in the administrative proceedings, his due process rights have been satisfied and the final administrative decision should be given preclusive effect.

5. *Tennessee Courts Would Give Preclusive Effect To The Final Administrative Decision.*

In determining whether to grant preclusive effect to the administrative decision in this case, a federal court should examine the rules of res judicata chosen

by the state of Tennessee. *O'Hara v. Board of Education of the Vocational School*, 590 F. Supp at 701; *Kremer*, 456 U.S. at 485; *cf. Allen v. McCurry*, 449 U.S. at 96 ("Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so. . . .").

The doctrine of res judicata applies to final orders of administrative agencies in Tennessee. *Purcell Enterprises, Inc. v. State*, 631 S.W.2d 401, 407 (Tenn. App. 1981) (citing *Polsky v. Atkins*, 197 Tenn. 201, 206, 270 S.W.2d 497, 499 (1954)). *See also Fourakre v. Perry*, 667 S.W.2d 483, 486 (Tenn. App. 1983) ("Appellee concedes in his brief that a final decision of an administrative agency creates estoppel under the doctrine of Res Judicata.").

As the Tennessee Supreme Court observed in *Cantrell v. Burnett & Henderson Co.*, 187 Tenn. 552, 216 S.W.2d 307, 309 (1948) (quoting 30 Am. Jur. at pp. 920-21):

> It is a fundamental principle of jurisprudence that material facts or questions, which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action between the same parties or their privies . . . whether the subsequent action involves the same or a different form or proceedings, or whether the second action is upon the same or a different cause of action, subject matter, claim, or demand, as the earlier action.

In the instant case, because the administrative judge determined that Elliott's allegations of race dis-

crimination were without merit and Tennessee courts would consider this issue conclusively settled, the federal action based on the same allegations of discrimination also is barred by principles of res judicata.[6]

C. Principles Of Res Judicata Must Be Applied To Encourage Judicial Finality And To Avoid Multiple Litigation.

"The policy considerations which underlie res judicata—finality to litigation, prevention of needless litigation, avoidance of unnecessary burdens of time and expense—are as relevant to the administrative process as to the judicial." *Painters District Council No. 38 v. Edgewood Contracting Co.*, 416 F.2d 1081, 1084 (5th Cir. 1969) (cases citations omitted). As this Court pointed out in *Kremer*, the opportunity to litigate a claim one time fully and fairly is all that is required by Title VII. 456 U.S. at 473-74. If this Court were to uphold the decision of the Sixth Circuit, it would drastically weaken the foundation of the *Kremer* opinion, because it would allow plaintiffs to litigate their claims of discrimination fully in state administrative forums and then, if they are not satisfied with the results, to go into federal court and begin litigation anew. Such a decision would, in practical terms, preclude employers from winning at the state level, because they could only win the opportunity to start defending all over again in federal court.

---

[6] *See Barnes v. Oody*, 514 F. Supp. 23, 25 (E.D. Tenn. 1981) (district court held that where truth of charges of sexual harassment established by administrative tribunals, subsequent action for defamation barred; collateral estoppel prevented relitigation of whether plaintiffs guilty of sexual harassment).

In *Aponte v. National Steel Service Center*, 500 F. Supp. 198, 204 (N.D. Ill. 1980), the United States District Court for the Northern District of Illinois commented on this problem, stating that:

> The tangled relationship between one employee and his employer, relating solely to the continued employment relationship, has been the subject of an arbitration, an FEPC proceeding carried through the administrative process to settlement, an EEOC proceeding carried through the administrative process to settlement, subsequent administrative proceedings which led to the conclusion that the claims did not have a reasonable basis, the filing of a federal court action, appointment of counsel, and the filing of amended pleadings resting upon Title VII, § 1981 of the Civil Rights Acts, age discrimination legislation and Illinois law.
>
> And, years later, we have only resolved the pleading questions.
>
> We have created an administrative, legislative and judicial labyrinth which serves no one well. * * * The aggrieved employee has multiple avenues to pursue, all strewn with technical obstacles and all of which may postpone any possible relief into the indefinite future. The result is a festering sense of injustice. The employer settles one claim and finds itself faced with a variety of others, all requiring it to employ professional help to guide it through, and to preserve its rights, in the various proceedings in which it finds itself a target.

Clearly, in these situations, principles of res judicata are properly invoked to "relieve parties of the cost and vexation of multiple lawsuits, conserve ju-

dicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry*, 449 U.S. at 94 (case citation omitted).

This Court should reiterate that litigation ad infinitum benefits no one. A party who has had an opportunity to litigate an issue of race discrimination fully and fairly to a final decision should be required to live with that decision. Another opportunity to litigate the same issue is not required by Title VII and certainly should not be created by this Court.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL *
KATHRYN SCULLY
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae
Equal Employment
Advisory Council

* Counsel of Record

January 24, 1986